IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 873 OF 1983

State Bank of India ....Plaintiff
V/s.
Moti Thawardas Dadlani & Ors. ....Defendants

Mr.Mody for the Plaintiff.
Mr.G. R. Kinkhabwala for the Defendants.

AND

SUIT NO. 1012 OF 1983

Ramesh Thawardas Dadlani & Ors. ...Plaintiffs
V/s.
The State Bank of India ...Defendants

Mr.G. R. Kinkhabwala for the Plaintiffs.

Mr.Mody for the Defendants.

CORAM : S.J. VAZIFDAR, J.
DATE : 18TH DECEMBER, 2006.

ORAL JUDGMENT :

1(A). Suit No.1012 of 1983 is filed for a decree in the sum of Rs.6,49,209.49/- with interest on Rs.5,71,337.49/- at the rate of 18% p.a. from the date of the suit till payment. In the alternative the plaintiffs have sought a decree against the Defendants in the

sum of Rs.1,17,364.60/- with interest at the rate of 18% on Rs.1,05,928.58/- from the date of the suit till payment. The suit was originally filed by Dadlani Silk Stores and the present Defendant no.2, Visharaj Garments Private Limited. By an amendment Dadlani Silk Stores were substituted by the present Plaintiff No.1, Ramesh Thawardas Dadlani.

(B). Suit No. 873 of 1983 is filed by the Defendants in Suit No. 1012 of 1983 for a decree in the sum of Rs.58,435.44/- together with interest at the rate of 19.50% per annum. Defendant Nos.1 to 3 in this suit were, at the material time, partners of Defendant No.4, Dadlani Silk Stores (Original Plaintiff No.1 in Suit No.1012 of 1983).

2. The parties agreed that the decision in Suit No. 873 of 1983 would follow the decision in Suit No. 1012 of 1983. Hence this common judgment in the two suits. The Counsel addressed me in Suit No. 1012 of 1983. The references in this judgment therefore pertain to the parties and facts in Suit No. 1012 of 1983.

The Plaintiff's case :

3. The Plaintiff's case is that pursuant to a request made by original Plaintiff No.1, Dadlani Silk Stores, the Defendants by a letter dated 2.2.1979 granted them a documentary imports Letter of Credit facility upto a limit of Rs.50 lacs, which was subsequently increased to Rs.75 lacs by a letter dated 14.12.1979. This was subject to a margin of 20% by way of lien on Term Deposit

Receipts issued by the Defendants in favour of Original Plaintiff No.1 or the current account balance of original Plaintiff No.1 and/or their associate concerns including Defendant No.2.

(A) The L/C facility was granted by the Defendants on the conditions mentioned in the letters dated 2/2/1979 and 14/12/1979 (Exhibit B-1 and B-2 respectively). The letter dated 2/2/1979 granted the facility to the extent of Rs. 50 lacs and the letter dated 14/12/1979 enhanced the sum to Rs.75 lacs. The common condition pertaining to the margin in both the letters reads as under:-

> "**Margin** : 20% by way of lien on Term Deposit Receipts issued by the Bank in your favour or your current account balance and/or your associate concerns, viz. M/s. Vishraj Garments Pvt. Ltd (Defendant No.2) and M/s. Oriented Fashion Exporters."

(B) The letter dated 14/12/1979 relied upon by the Plaintiffs reads as under :

> "3. As the above arrangement is granted upto 12th December, 1980 please apply to us early in the first week of December, 1980 for its renewal, inter-alia furnishing the requisite data."

(C) In view of the submission based on Clause 3 of the letter dated 14/12/1979 it will be convenient at this stage to refer to a letter dated 3/10/1978 (Exhibit 8-B) addressed by Plaintiff No.2 to the Defendants. Plaintiff No.2 requested the Defendants to grant original Plaintiff No.1 the said L/C facility equal to the full

face value of two Term Deposit Receipts (T.D.R.'s) of Rs.5 lacs and Rs.5,45,110/- less the amount noted as lien against the guarantees issued amounting to Rs.6,40,000/-. In other words Plaintiff No.2 requested the Defendants to grant original Plaintiff No.1 the L/C facility against its T.D.R.' s to the extent of Rs.4,05,110/-. Plaintiff No.2 further agreed that in case original Plaintiff No.1 defaulted in the commitment against the L/C the Defendants may deduct such amount from the T.D.R' swithout reference to it. The letter did not stipulate any time limit for the validity of this security.

4. Original Plaintiff No.1 had agreed to purchase from Ocilac Inc, (beneficiary) a company based in New York, 200 metric tonnes of Phenol USP (hereinafter referred to as `the said goods') as per an indent dated 4/1/1980 of M/s. Jai Vikas at a price of US$ 800 per metric tonne CIF, Bombay. It was a condition of the contract that the payment should be made by means of an irrevocable Letter of Credit. Jai Vikas by a letter dated 4/1/1980 called upon original Plaintiff No.1 to open the irrevocable L/C without recourse as per the details therein specified.

(A). Accordingly original Plaintiff No.1 made an application to the Defendants dated 11/1/1980 to open the L/C of U.S.$ 79,800.35 covering 100 metric tonnes of the said goods as per the indent dated 4.1.1980 in favour of the beneficiary against the import licences of original Plaintiff No.1. In the application original Plaintiff No.1 gave certain instructions. As the same were incorporated in the L/C I will refer to them while dealing with the

L/C itself.

(B) Pursuant to the said application the Defendants opened an irrevocable L/C dated 11/1/1980 as set out in a telex dated 12/1/1980, to Chemical Bank, New York, USA the intermediary bank, authorising the beneficiary to draw on original Plaintiff No.1 for a sum not exceeding U.S.$ 79800.35 CIF available by their drafts at sight for 100% of the invoice value and accompanied by the documents mentioned therein. The relevant part of the L/C reads as under :-

> "The goods should be shipped in two lots of approximately 50 tonnes each by separate vessels with minimum gap of ten days between each shipment, containing atleast five bills of lading. none of which exceeding 10 tons".
>
> "This credit is subject to Uniform Customs and Practices for Documentary Credits (1974 Revision) International Chambers of Commerce Publication No.290."

5(A). By a letter dated 19/2/1980 (Exhibit B-7) the Defendants informed original Plaintiff No.1 of having received the documents negotiated under the said L/C and requested that arrangements be made to retire the same at an earlier date. The letter itself indicated that the documents negotiated by Ocilac Inc., through Chemical Bank contained discrepancies.

(B). Original Plaintiff No.1 by a letter dated 22/2/1980 informed the Defendants that the documents were not acceptable

due to the discrepancies mentioned therein namely that the bill of lading was dated 15/10/1979 which was prior even to the opening of the L/C and that contrary to the terms of the L/C only one bill of lading was made instead of five bills of lading none of which were to exceed 10 tonnes. Original Plaintiff No.1 therefore requested the Defendants to return the documents to their correspondent, namely Chemical Bank.

(C). Original Plaintiff No.1 by a letter dated 28/2/1980 addressed to M/s. Forbes Forbes & Campbell Company Ltd., the agents of American President Lines Ltd. requested information regarding the date of arrival of the ship at the port of Bombay. M/s.Forbes Forbes and Campell Ltd. informed original Plaintiff No.1 that there were in fact seven bills of lading, each of which was dated 15/10/1979.

6. Correspondence ensued between Plaintiff No.1 and the Defendants, in the course of which Plaintiff No.1 referred to the various discrepancies in the documents tendered by the beneficiary Ocilac Inc., while negotiating the L/C. Correspondence in this regard also ensued between the Defendants and Chemical Bank. Suffice it to state at this stage that Chemical Bank took a stand that the negotiation atleast in part was in accordance with the terms of the L/C. As I shall demonstrate while dealing with the issues, the Defendants themselves were of the view that the documents contained discrepancies and were not negotiated in accordance with the L/C. Despite the same, by a telex dated 12/3/1980 the Defendants informed Plaintiff No.1 that payment

should be made. The Defendants referred to Articles 8 and 16 of the UCP. It is important to note that the letter did not deal with or consider the various discrepancies pointed out by original Plaintiff No.1.

7. The Defendants also informed the Plaintiffs that Chemical Bank had informed them that the beneficiary had informed Chemical Bank that the matter was being settled with original Plaintiff No.1. The Defendants requested information from original Plaintiff No.1 regarding the same. By their letter dated 20/3/1980, original Plaintiff No.1 stated that they had never been contacted by the beneficiary and that there was no question of any settlement as they were not prepared to accept the documents. In the subsequent correspondence, original Plaintiff No.1 reiterated the same. By a telex dated 2/6/1980 addressed to Plaintiff No.1 the Defendants referred to a telex dated 12/3/1980 received by the Defendants from Chemical Bank. Chemical Bank apparently had alleged that they had examined the documents once again and had come to the conclusion that they fully conformed to the terms of the L/C. Chemical Bank contended in a telex dated 31/5/1980 (Exhibit 8 CC) that the credit did not state that goods must be shipped on separate vessels but only stated “should” be shipped on separate vessels and that they considered the same an option for the beneficiary.

8. Unfortunately Chemical Bank is not a party to the suit. Subject to what they may hypothetically have to say the stand and the conduct of Chemical Bank appears to be ex-facie

unsustainable. It is difficult to understand how Chemical Bank could have considered the word “should” as an option for the benefit of the beneficiary. Chemical Bank had not even addressed themselves of any of the material discrepancies.

9. By a telex dated 29/10/1981 the Defendants informed original Plaintiff No.1 that they had been able to prevail upon the Chemical Bank to refund U.S.$ 39,644 pertaining to the second negotiation under the credit. The Defendants further stated that in respect of bill no. 80/80809 also for US$ 39,644/- negotiated by the Chemical Bank, they had retained the documents and not intimated the Chemical Bank about non-acceptance of the documents as required under the UCP as per the request of original Plaintiff No.1 vide their telex dated 22.2.1980. The request refers to an endorsement by/on behalf of original Plaintiff No.1 on the telex. One of the disputes before me is whether in fact there was an endorsement on the telex dated 22/2/1980 (Exhibit B-8) as alleged by the Defendants as under :-

> “Please keep this matter pending. We are verifying from the shipping company the exact date of the arrival of the steamer”.

The Plaintiffs have disputed this endorsement.

The Defendants also stated that by letters dated 3/3/1980 and 13/3/1980, original Plaintiff No.1 advised them to refuse the documents. The Defendants stated that Chemical Bank had finally contended that the documents conformed to the credit.

The Defendants further stated that if they failed in their attempt to recover the amount from Chemical Bank they would recover the amount from the Plaintiffs.

10. By their letter dated 9/11/1981 original Plaintiff No.1 once again instructed the Defendants to return the documents to Chemical Bank stating therein the reasons for refusal. Original Plaintiff No.1 further stated that the stand of Chemical Bank was untenable and constituted a fraud. The Plaintiffs have also alleged that the Chemical Bank and the beneficiary had tampered with the documents after the discrepancies had been pointed out.

11. By a letter dated 23/8/1982 (Exhibit B-10) the Defendants advised Plaintiff No.2 that out of the aforesaid T.D.R's, a sum of Rs.4,28,000/- was credited to its current account and Rs.4,76,337.49/- had been held under suspense account. By a further letter dated 25/8/1992 the Defendant informed Plaintiff No.2 that an amount of Rs.4,76,337.49/- was being held as a cover for the liabilities of original Plaintiff No.1 and that it was therefore not possible to release the same. Plaintiff No.2 by its letter dated 5/10/1982 contended that the same was unauthorised.

12. Thereafter meetings were held between the parties in an endeavour to resolve the disputes.

13. Thereafter, further correspondence ensued between the parties in the course of which each of them reiterated their respective stands.

It is pertinent to note that there are no allegations by the Plaintiffs against the Defendants of any mala-fides. Nor are there

any allegations against the Defendants of their having colluded with the intermediary bank and/or the beneficiary.

14. The subsequent correspondence between the parties essentially deals with what had been stated by them throughout. It is sufficient to note here only a few letters.

By a letter dated 8/10/1982 (Exhibit B20), the Plaintiffs inter-alia stated that if any demand was conclusively established against them they were sufficiently solvent to pay the same.

By a letter dated 24/1/1983 (Exhibit B-23) the Plaintiffs stated as under :-

> "Therefore we cannot understand why there is no action on your part to recover the amount from your correspondent bank".

It may be noted that in none of these letters nor in any other correspondence or otherwise did the Plaintiffs instruct / direct the Defendants to adopt legal proceedings against the intermediary bank or the beneficiary stating that they would bear the costs of such litigation. Nor did the Plaintiffs offer to pay the Defendants the loss caused as a result, I will presume, of the wrongful act of Chemical Bank in debiting the Defendants account. This aspect will assume considerable significance while dealing with the defence based on Article 12 of the UCP.

In this connection it is also pertinent to note a letter dated 25/1/1983 (Exhibit B-24) addressed by the Defendants to the Plaintiffs contending that the documents in question were in order according to the rules of the International Chamber of Commerce

and that it was not possible for the Defendants to bring or sustain any action against the Chemical Bank in USA. The Defendants therefore called upon the Plaintiffs to discharge their liability under the agreement of indemnity contained in the application for the Letter of Credit and/or otherwise under law. The Defendants informed the Plaintiffs of their having adjusted the TDR's and demanded payment of the balance of Rs.58,124.91/-. As observed earlier, on receipt of the letter the Plaintiffs did not tender the amounts demanded by the Defendants but called upon them to adopt appropriate proceedings at their cost. This aspect too will assume significance while dealing with the defence based on Article 12 of the UCP.

15. It is in these circumstances that the Plaintiffs contended that the Defendants are not entitled to claim any amounts either by way of indemnity or otherwise. In Suit No.1012 of 1983, the Plaintiffs accordingly claimed a decree for the amounts adjusted/appropriated by the Defendants and resisted the Defendants Suit No. 873 of 1983.

The Defendants Case :

16. The Defendants contended that the suit is not maintainable as it is filed on behalf of Plaintiff No.2 without a prior resolution being passed by Plaintiff No.2 to that effect and is liable therefore to be dismissed. The Defendants contended that in view of the application for opening the L/C the Plaintiffs were bound and liable to pay all amounts that the Defendants would be required to pay under the L/C.

17. Chemical Bank negotiated the first set of documents on presentation thereof by the beneficiary on 5/12/1980 and forwarded the same to the Defendants for payment. These documents were received by the Defendants on 19/2/1980 and immediately on receipt thereof, the Defendants called upon original Plaintiff No.1 to pay the amount under the said documents and to retire the same.

18. The beneficiary drew upon the L/C by a second set of documents. Chemical Bank negotiated the documents on 13/2/1980 and forwarded the same to the Defendants. The second set of documents were received by the Defendants on 22/2/1980. The Defendants called upon original Plaintiff No.1 to pay the amount under the second set of documents and to retire the same. The Defendants admit the letter dated 22/2/1980 by which the Plaintiffs stated that the documents were not acceptable as they contained certain discrepancies. The Defendants, however, alleged that one Moti Thawardas Dadlani, who was the partner of original Plaintiff No.1 by the said endorsement on the letter requested the Defendants to keep the matter pending as original Plaintiff No.1 was verifying from the shipping company the exact date of the arrival of the steamer. I have quoted the endorsement earlier. The Defendants further allege that they were orally informed that original Plaintiff No.1 expected to settle the matter with the beneficiary and that the only dispute between them was as regards the liability for payment of demurrage charges to the Bombay Port Trust. The demurrage had arisen on account of the fact that the goods had arrived and been at the docks prior to the

date of the issuance of the L/C. The Defendants thereafter set out the correspondence which I have already referred to while setting out the Plaintiffs case.

19. The Defendants contended that in exercise of their rights under the indemnity and guarantee and the said letters dated 3/10/1978 they appropriated a sum of Rs.95,000/- retained by the Defendants out of the Current Account of original Plaintiff No.1 and Rs.4,76,337.49/- out of the proceeds of TDR No.048876 dated 22/7/1977 belonging to Plaintiff No.2. There remains according to the Defendants the balance amount which is claimed by them in Suit No. 873 of 1983.

20. It may be noted that in paragraphs 11 and 27 of the Written Statement, the Defendants have set out the stand taken by the Chemical Bank to the effect that the documents tendered by the beneficiary were valid and in order and that they had duly negotiated the L/C ; that in any event the first set of documents were in full compliance with the terms of the L/C and that they had refused to reverse the debit against the Defendants in respect of the first set of documents in the sum of U.S.$ 39,688.

The monies were withheld by them pursuant to the lien created by Plaintiff No.2 by the letter dated 3/10/1978 (Exhibit 8-B). In paragraph 34 the Defendants denied that Chemical Bank cleared the bills with discrepancies; that the documents were tampered with; that they did not safeguard the interest of the Plaintiffs; that no valid demand had been made; that no liability had been proved and that the adjustments made by the

Defendants were unauthorised. The Defendants denied that the documents tendered were not in accordance with the terms of the L/C and submitted that therefore there was no question of rejecting the same or not claiming indemnity or reimbursement by the Plaintiffs in respect of the payments made by the Defendants against the documents. It may also be noted here that there is no submission that the discrepancies which admittedly were apparent on the face of the documents were liable to be ignored by the Defendants, as the issuing bank and by Chemical Bank, the negotiating bank. This stand in the written statement is indeed curious as it is contrary to the stand taken by the Defendants in the correspondence with Chemical Bank.

21. In regard to one of the issues concerning the authority of the present Plaintiff No.1 to act on behalf of Plaintiff No.2, it is pertinent to note that in the Written Statement and in particular paragraph 33 thereto, the Defendants have expressly stated that original Plaintiff No.1 and Plaintiff No.2 were associate concerns. In paragraph 5 of the Written Statement the Defendants have stated that the partners of original Plaintiff No.1 were also shareholders and directors of Plaintiff No.2. This is in fact correct and is an admitted position.

ISSUES

22. Issues were settled by an order dated 8/8/2004. Thereafter evidence was led before the Commissioner and the matter first came up for hearing on 15/6/2006. At the request of the learned counsel I reframed the issues. The issues as

reframed are as under :-

1(a) Whether the Plaintiff No.1 has become the sole proprietor of M/s.Dadlani Silk Stores ?

(b) Whether Plaintiff No.1 is entitled to prosecute an defend legal proceedings filed by or against the said M/s.Dadlani Silk Stores - the Original Plaintiff No.1 as alleged in para 1 of the plaint ?

2(a) Whether Plaintiff No.1 was or is authorised to give evidence on behalf of Plaintiff No.2 ?

(b) If the answer to Issue No.2(a) is in the negative, whether the suit is liable to be dismissed as far as Plaintiff No.2 is concerned ?

3. Whether the Plaintiffs prove that the bills of lading dated 15th October, 1979 contained discrepancies as alleged in paragraph 13 of the plaint ?

4. Whether the documents tendered by the beneficiary / Chemcial Bank for negotiating the letter of credit were not in accordance with the terms and conditions of the letter of credit as alleged in paragraph 27 of the plaint ?

5. Whether the Defendant was bound to reject the documents tendered by the beneficiary/Chemcial Bank for the reasons alleged in paragraph 27 of the plaint ?

6. Whether the Plaintiffs prove that the Defendants were not entitled to claim indemnity and reimbursement from the Plaintiffs for the reasons alleged in paragraph 27 of the plaint ?

7. Whether the Plaintiff by an endorsement on their letter dated 22nd February, 1980 requested the Defendants to keep the matter pending as Plaintiff No.1 was verifying from the shipping company the exact date of arrival of the steamer as alleged in paragraph 11 of the written statement ?

8. Whether the Defendants prove that they were informed by the partner of Original Plaintiff No.1 that the dispute between the beneficiary is with regard to demurrage and that they were expected to settle the same with the beneficiary of the Letter of Credit as alleged in paragraph 11 of the written statement ?

9. If the answer to Issue No.7 is in the affirmative, whether the Defendant was entitled to claim reimbursement or indemnity from the Plaintiffs even assuming that the answer to Issue Nos. 4 and 5 are in the affirmative ?

10. Whether the Defendants were negligent as alleged in paragraph 27 of the plaint ?

11. Whether the Plaintiffs prove that the action of the Defendants withholding the sums of Rs.95,000/- and Rs.4,76,337.39/- belonging to the Plaintiff No.1 and Plaintiff No.2 respectively was unjustified and not valid as alleged in paragraphs 20, 23 and 28 of the Plaint ?

12. Whether the Defendants were bound to initiate legal action against the correspondent bank and the beneficiary of the letter of credit as alleged by the Plaintiffs as alleged in paragraph 24 of the plaint ?

13. To what reliefs, if any, are the Plaintiffs entitled ?

14. What orders are to be passed ?

The learned Commissioner tendered his report. I will deal only with those objections to the oral and documentary evidence as counsel addressed me on.

RE: ISSUE NO. 1(a) and 1(b)

1 (a) Whether the Plaintiff No.1 has become the sole proprietor of M/s. Dadlani Silk Stores ?

(b) Whether Plaintiff No.1 is entitled to prosecute and defend legal proceedings filed by or against the said M/s. Dadlani Silk Stores the Original Plaintiff No.1 as alleged in para 1 of the plaint ?

23. According to Plaintiff No.1 he became the sole proprietor of M/s. Dadlani Silk Stores pursuant to the dissolution of original Plaintiff No.1 as recorded in a Deed of Dissolution dated 7/2/1984 (Exhibit B-26). As per the deed of dissolution, three partners namely Indur T. Dadlani, Moti T.Dadlani, M/s. Sterling Shoes Private Limited retired as partners and Plaintiff No.1 became the sole proprietor of M/s. Dadlani Silk Stores. Plaintiff No.1 became the sole proprietor of the firm and took over the assets and liabilities of the firm and undertook to indemnify the erstwhile partners. Under Clause 1, original Plaintiff No.1 stood dissolved from the close of 6/2/1984. Clauses 6, 10 and 12 of the deed of dissolution reads as under :-

“6. The party hereto of the Third Part Mr.Ramesh T. Dadlani, has been alloted towards the adjustments of his rights in the net assets relating to the partnership business, all the assets excepting the goodwill of the business of Head Office at Shop in Cecil Court, Shop Premises at Cecil Court, Furniture lying in the Head Office at Cecil court, Stock-in-trade of Shoes, deposit lying with BEST, Bank-Account with Bank of America, Cash on Hand of Rs.1,890/- which are alloted to the party hereto of the Fourth Part as per Clause No.4 of this Dissolution Deed.

10. It is agreed that the parties hereto of the First, Second and Third part as the partners of then Partnership Firm of M/s. Dadlani Silk Store, shall be entitled to defend and prosecute receive, pay and settle respectively the said two suit pending in the High Court of Judicature at Bombay, being O. O. C. J. Suit No. 873 of 1983 (State Bank of India vs. Moti T. Dadlani and Others) and Suit No. 1012 of 1983 (Dadlani Silk Stores & Others V/s. State Bank of India) for on behalf of the dissolved Partnership firm of M/s. Dadlani Silk Store. The parties hereto of the First, Second and Third Part as the then partners of the said firm of M/s.Dadlani Silk Store shall at their own costs and risk be entitled to defend and prosecute the hereinbefore recited two suits filed by and against the State Bank of India, respectively with full and sufficient power and authority to defend, prosecute, settle compound for, refer or submit the said suits or either of them or any question or controversy following thereto, to Arbitration and otherwise to act in their best

interest.

12. Notwithstanding anything stated here or provided in these presents, it is hereby agreed by and between the parties hereto that all parties hereto in due course pay their respective liabilities if any for Income Tax, Surcharge or any other taxes in respect of the profits or income made by the said partnership firm in proportion to their respective shares prior to the date of dissolution as aforesaid and shall and will justly indemnify and keep indemnified each other, their respective heirs, executors and administrators and their estates and effects from and against all claims, demands, actions, proceedings that may be adopted or taken and against all costs, charges and expenses that may be incurred in respect thereof."

24. Mr. Mody, submitted that under clause 10 all the assets vest not in Plaintiff No.1 (described in the Deed of Dissolution as party of the third part) but in M/s.Sterling Shoes Private Limited (party of the fourth part in the Deed of Dissolution). The submission is not well-founded.

25. Clause 6 makes it clear that all the assets had been alloted to Plaintiff No.1. The clause does not require any construction. The plain language thereof is clear. Clause 10 is consistent with Clause 6 as it provides inter-alia that M/s. Sterling Shoes Pvt. Ltd shall be entitled to carry on its business under the name and style of M/s. Dadlani Silk Stores. This is consistent with the fact that in Clause 6 the goodwill has not been assigned to

Plaintiff No.1. The doubt if any, is removed by the express language of Clause 11 which provides that the parties of the first and third parts thereto shall be entitled to defend and prosecute, receive, pay and settle the two suits for and on behalf of the dissolved firm, original Plaintiff No.1. That the parties of the first and the second part were also authorised under Clause 11 to prosecute these litigations would not deprive Plaintiff No.1 from prosecuting these two suits alone, for except for the goodwill, in fact, and in law the assignment of all assets of the erstwhile firm, original Plaintiff No.1, stood vested in Plaintiff No.1. The three clause reproduced above are therefore consistent and in conformity with each other.

26(a). In that view of the matter, the cross-examination of Plaintiff No.1 at Question No.42 would make little difference to his right to maintain the action. It was put to Plaintiff No.1 that Rs.11,24,604 was paid to him by M/s. Sterling Shoes Pvt. Ltd for retaining the shop.

(b). An objection was taken to the question. The objection is unsustainable and is overruled. The question was permissible in view of the stand taken by the Plaintiffs based on the deed of dissolution and the amendment carried out to the plaint.

(c). The witness / Plaintiff no.1 answered that the said sum was paid to him to retain the shop. He has further stated that the said sum was paid on account of goodwill. The question is without a sequiter. Whether the amount was paid on account of goodwill or whether it was paid to retain the shop, the fact remains that by

the deed of dissolution the assets of the firm vested in Plaintiff No.1.

27. The mere fact that in the title to both the suits Plaintiff No.1 has described himself as carrying on business under the name and style of M/s. Dadlani Silk Stores would not make any difference to his right to maintain the action in his individual name. Much was sought to be made of the fact that in the title, Plaintiff No. 1 has stated that he is carrying on business in the name and style of Dadlani Silk Stores and that the same is reiterated in his affidavit-in-lieu of examination-in-chief dated 20/09/2004. Mr. Mody also relied upon the cross-examination of Plaintiff No.1 at Question Nos.28 to 45. Further in answer to Question No.28, Plaintiff No.1 has asserted that he is carrying on business in the name and style of M/s.Dadlani Silk Stores as well as Dadlani Handicrafts Emporium.

28. Firstly, I would overrule the objections to Question Nos.28 to 45. In view of the stand taken by the Plaintiffs regarding the deed of dissolution the cross-examiner is certainly entitled to put questions to the witness pertaining to the same.

29. The cross-examination however does not assist the Defendants' case. In answer to Question No.29, Plaintiff No.1 stated that he had documentary evidence to show that he is carrying on business in the name of M/s.Dadlani Silk Stores. He further stated that he has balance-sheets up to the current year to demonstrate the same. It is important to note that no further cross-examination in this regard was conducted. Plaintiff No.1 was

thereafter not called upon to produce the documents.

30. It is true that the deed of dissolution permits Sterling Shoes Pvt. Ltd to carry on business in the name of Dadlani Silk Sotes. That by itself does not establish that Plaintiff No.1 did not carry on business in the said name. That doing so may be contrary to the deed of dissolution and to the rights of Sterling Shoes Pvt. Ltd. therein is another matter.

31. In the circumstances Issue Nos.1 (a) and 1(b) are answered in the affirmative.

RE : ISSUE NO.2(a) and 2(b) :

2(a) Whether Plaintiff No.1 was or is authorised to give evidence on behalf of Plaintiff No.2 ?

(b) If the answer to issue No.2(a) is in the negative, whether the suit is liable to be dismissed as far as Plaintiff No.2 is concerned ?

32. Mr.Kinkhabwala had clarified on 15/6/2000 itself that issue Nos.2(a) and 2(b) were fresh issues and that the parties did not lead evidence in respect thereof. The issue had been raised by the order dated 8/8/2004. It would be unfair to the Plaintiffs to permit fresh issues to be raised which involve mixed questions of law and fact when the parties had no opportunity of adducing evidence in respect thereof.

33. Mr.Mody submitted that the issue could not have been framed initially as evidence was led only after the issues were framed.

34. Even assuming that the issue can now be permitted to be raised, it must be answered against the Defendants and in favour of the Plaintiffs. Admittedly Plaintiff No.1 was a Director of Plaintiff No.2 when the suit was filed. Article 45(v)(Exhibit 4) authorises the Directors of Plaintiff No.2 inter-alia to institute, conduct, and defend any legal proceedings by or against Plaintiff No.2. The plaint was affirmed by Moti T. Dadlani who was also a Director of Plaintiff No.2 when the suit was filed. There is no dispute regarding his authority to have instituted the suit. There is no dispute regarding the authority of the said Moti T. Dadlani to have appointed advocates which he did and his advocates filed a Vakalatnama in this Court. Once it is found that the proceedings are validly instituted that is sufficient as far as the institution of proceedings is concerned.

35. There is nothing under Section 291 and 292 of the Companies Act which requires a separate board resolution to be passed for every witness that the company may desire to examine.

36. In *United Bank of India vs. Naresh Kumar* reported in *1996 (6) SCC 660,* the Supreme Court has held as under :-

> "9. In cases like the present where suits are instituted or defended on behalf of a public corporation, public interest should not be permitted to be defeated on a mere technicality. Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. There is sufficient power in the courts, under the Code

> of Civil Procedure, to ensure that injustice is not done to any party who has a just case. As far as possible a substantive right should not be allowed to be defeated on account of a procedural irregularity which is curable.
>
> 13. The court had to be satisfied that Shri L.K. Rohatgi could sign the plaint on behalf of the appellant. The suit had been filed in the name of the appellant company; full amount of court fee had been paid by the appellant-Bank; documentary as well as oral evidence had been led on behalf of the appellant and the trial of the suit before the Sub-Judge, Ambala, had continued for about two years. It is difficult, in these circumstances, even to presume that the suit had been filed and tried without the appellant having authorised the institution of the same. The only reasonable conclusion which we can come to is that Shri L.K. Rohatgi must have been authorised to sign the plaint and, in any case, it must be held that the appellant had ratified the action of Shri L.K. Rohatgi in signing the plaint and thereafter it continued with the suit".

37. The ratio and the observations of the Supreme Court would apply with greater force when it is only a question of witnesses being examined on behalf of a company. The amendment was carried out on 25/6/2003 when Plaintiff No.1 was brought on record. Plaintiff No.2 remained throughout on record. The advocate of Plaintiff Nos.1 and 2 obviously are the same. If there was any dispute by Plaintiff No.2 regarding the entitlement of Plaintiff No.1 to give evidence on its behalf or to conduct the

proceedings in any other manner on its behalf it would have said so. The fact that no such objection has been taken indicates that Plaintiff No.2 had in any event authorised Plaintiff No.1 to conduct the proceedings on its behalf as also to give evidence on its behalf.

38. Mr.Mody relied upon the cross-examination of Plaintiff No.1 at Question Nos.9 to 18. The cross-examination does suggest that Plaintiff No.1 is not presently concerned with the management or business of Plaintiff No.2. His brother Moti T. Dadlani is concerned with the affairs of Plaintiff No.2. However it is pertinent to note that in answer to Question No.15 as to whether Plaintiff No.1 has any connection with Plaintiff No.2 he categorically stated that he was concerned with Plaintiff No.2 because there were certain court cases pending with which he was connected. There in nothing in the cross-examination to suggest that Plaintiff No.1 was not authorised to prosecute these suits on behalf of Plaintiff No.2.

39. Mr.Mody relied upon Question Nos.21 to 24 pertaining to the cross-examination of Plaintiff No.1. Plaintiff No.1 has candidly admitted that he was not aware whether any resolution was passed by Plaintiff No.2 authorising him to depose on his behalf. However, as I have observed earlier, it is not necessary for a resolution to be passed by a company in respect of each witness.

40. In answer to Question Nos.48 to 57, Plaintiff No.1 stated that his earlier deposition that he was not aware whether he was a Director of Plaintiff No.2 was because his mind had gone

blank on that date. He stated that this was because the matter was twenty five years old. In my view nothing much can be made of this. The fact is that the evidence in the matter was led after twenty five years. The witness can hardly be faulted for not having a perfect recollection. It must be remembered that an issue in this regard was not even raised. Nor was any objection taken at the outset of Plaintiff No.1 leading any evidence on behalf of Plaintiff No.2. He asserted in answer to Question Nos.48 to 57 that he was a Director of Plaintiff No.2. However, the question really is irrelevant as the witness does not have to be a Director of the company to depose on behalf of the company.

41. The document marked for identification as ` X2' was not proved and cannot be considered in evidence. It is a copy of Form 32 filed with the ROC on 12/2/1976. The same however makes no difference to the merits of the case.

42. The documents marked for identification as `Y-1' and ` Y5' have clearly not been proved. The same are in any event irrelevant as a mere certificate by a bank cannot establish whether a person is or was a Director of company or not.

43. Issue No.2 is answered in affirmative. Issue No. 2(b) therefore does not arise.

RE: ISSUE NOS.3, 4 AND 5:

> 3. Whether the Plaintiffs prove that the bills of lading dated 15th October, 1979 contained discrepancies as alleged in paragraph 13 of the plaint ?

4. Whether the documents tendered by the beneficiary/Chemcial Bank for negotiating the letter of credit were not in accordance with the terms and conditions of the letter of credit as alleged in paragraph 27 of the plaint?

5. Whether the Defendant was bound to reject the documents tendered by the beneficiary/Chemical Bank for the reasons alleged in paragraph 27 of the plaint ?

44. It will be convenient to deal with issue Nos.3, 4 and 5 together as the references to the pleadings, the evidence, the questions of law and the facts in respect thereof are common.

45. I have already set out the terms of the L/C. The terms subject to which the beneficiary was entitled to negotiate the L/C were clearly stipulated. They indicate at least the following six essential prerequisites to the negotiation of the L/C :-

(1) The goods should be shipped in two lots.

(2) Each lot must be of approximately 50 tonnes.

(3) The goods should be shipped by separate vessels.

(4) There must be a minimum gap of 10 days between each shipment.

(5) Each shipment must contain at least five bills of lading.

(6) None of the Bills of Lading should exceed 10 tonnes.

46. The issues can be approached and answered in three ways. Firstly, the Defendants represented to the Plaintiffs that the documents contained discrepancies. Secondly, the Defendants

themselves were of the view and had admitted at all material times that the documents contained discrepancies. Thirdly, the documents in fact contained discrepancies and the L/C could not have been negotiated by the beneficiary without the express consent of the Plaintiffs waiving the same.

The Defendants themselves represented to the Plaintiffs that the documents contained discrepancies.

47. The first document in this regard is the letter dated 19/1/1980 (Exhibit B-7). By this letter the Defendants informed the Plaintiffs that they had received the documents negotiated under the L/C as per the particulars mentioned therein and requested the Plaintiffs to arrange to retire the same. The particulars mentioned were of a bill of lading No.1676356 dated 15/10/1979. Thus on the face of it, the document contained atleast two discrepancies. These were specified by original Plaintiff No.1 by a letter dated 22/2/1979 (Exhibit B The original is at Exhibit 2), namely that the bills of lading was prior even to the date of the opening of the L/C and there was only one bill of lading. Even assuming that there were in fact five bills of lading, the Plaintiffs were by the communication dated 19/2/1980 informed that the documents did contain discrepancies. Thus, on the basis of what was stated in the letter dated 19/2/1980 (Exhibit B-7) itself the Plaintiffs were entitled to reject the documents. This would be so even assuming that in fact there were five bills of lading and the officers of the Defendants made a mistake in stating that there was only one bill of lading.

48. The subsequent correspondence by the Defendants I shall now refer to also establish that the Defendants represented to the Plaintiffs that the documents contained discrepancies and did not conform to the L/C.

The Defendants themselves considered the documents as not conforming to the terms of the L/C. The documents contained discrepancies and the beneficiary negotiated the L/C contrary to the terms thereof.

49. The same is evident from atleast four documents.

50. The document dated 22/2/2000 was marked ` Y2" for identification. By consent of the counsel this document was admitted in evidence and marked ` Exhibit 8 LL'. This document is similar to the document dated 19/2/1980 (Exhibit B-7) and pertains to the second shipment. With this advice the Defendants expressly stated that the documents negotiated under the L/C in the second shipment contained discrepancies. The discrepancies were endorsed by the Defendants themselves in this document in the following manner :-

> "The B/L (bills of lading) have two different dates - one date is prior to opening of L/C. - No proper authentication on B/L (bills of lading). Shipment effected on one vessel instead of separate vessels."

51. This endorsement is crucial. It establishes beyond any doubt that the Defendants considered that the documents contained discrepancies and were not in conformity with the letter

of credit. Strictly speaking nothing further is required as far as the stand of the Defendants is concerned on this issue. I am conscious that in respect of the two sets of documents negotiated by the beneficiary, the negotiating bank had reversed the entry in respect of the second set. The endorsement however also applies to the first set under which also the date of the invoice was prior to the date of the L/C.

52. By a telex dated 31/3/1980 (Exhibit 8R) addressed to Chemical Bank the defendant after referring to the earlier telex dated 3/3/1980 stated that the documents were being held at the risk and responsibility of Chemical Bank “in view of discrepancies therein”. The Defendants therefore requested Chemical Bank to credit their account with the entire amount in respect of both shipments. This stand was reiterated by the Defendants' further telexes dated 10/4/1980 (Exhibit 8-S), 14/4/1980 (Exhibit 8-U), 17/4/1980 (Exhibit 8-V) when Chemical Bank refused to accede to the Defendants' request.

53. In fact by the said telex dated 17/4/1980 the Defendants stated that they would return the documents to Chemical Bank if the matter had not been settled by 23/4/1980. It is pertinent to note that Chemical Bank initially contended that the beneficiaries had assured them that the Plaintiffs buyers were going to accept the documents. The stand taken subsequently by Chemical Bank was to the contrary. Chemical Bank took a curious stand that the dispute was between the buyers and sellers. Prima-facie the attitude of Chemical Bank appears to be contrary

to all banking norms and practices and the provisions of the UCP. I say prima-facie only because Chemical Bank is not before me.

54. It is also pertinent to note that the L/C prohibited transshipment. The Defendants by a telex dated 29/4/1980 (Exhibit-8-X) addressed to Chemical Bank stated that despite the L/C prohibiting transshipment the consignment had been transshipped to Singapore. The Defendants therefore requested Chemical Bank to reverse the debits. Chemical Bank in reply by a telex dated 6/5/1980 stated that it considered the documents in order. It is impossible to understand the stand of Chemical Bank. That however is a different matter as neither party has chosen to institute proceedings against Chemical Bank.

55. The Defendants by an inter office letter addressed to their New York branch dated 8/5/1980 (Exhibit 8Z) stated in reference to the two sets of negotiations as under :-

> "On receipt of documents we have noted the following discrepancies :-
>
> "As per Credit terms goods should be shipped in two lots of approximately 50 tons each by separate vessel. Each shipment containing at least 5 B/Ls none of which exceeding 10 tons whereas documents indicated both shipments effected per one vessel, i.e. PRESIDENT MADISON under some voyage and each B/L indicates weight as 10683 Kg.(Gross). B/L/ Nos. 167352 to 167356 in case of one set of documents indicates shipping dates as 15.10.1979 and hand written date 25.1.80 and on other set of documents B/L Nos.167347 to 167351 as

15.10.79 and 8.2.80".

Since the documents contained discrepancies, drawees are not agreeable to take up the documents, we advised Chemical Bank, New York through you vide our telex No.CBIS/1602 dated 3rd March, 1980 (copy enclosed) that documents are not acceptable to drawees and are held at the risk an responsibility and we further requested them to credit the amount to our account with proper value date. Chemical Bank, New York requested us not to return the documents and also advised us that dispute is between sellers and buyers and sellers have contacted buyers for settlement. We had contacted openers on various occasions but they have categorically informed us that they have never been contacted by either the shippers or their indentors.

We are, therefore, forwarding the captioned documents to you with a request to lodge the same to Chemical Bank, New York

Attn: Mr. V. Marinaccio, L/C Department with a request to credit us with interest @ 18 ½ from date of debit till the date funds are credited to us. Please therefore take up the matter with the Bank and arrange for the refund of the amount with interest." (emphasis supplied)

56. Thus it is clearly established that the Defendants stand throughout was that the documents tendered by the beneficiary did not conform to the L/C. I therefore hold that the documents

tendered by the beneficiary and the negotiating bank to the Defendants were not in conformity with the Letter of Credit, and contained discrepancies and the Defendants were bound to reject the same.

57. In the circumstances, issues No.3, 4 and 5 are answered in the affirmative.

RE : ISSUE NO.7

> 7. Whether the Plaintiff by an endorsement on their letter dated 22nd February, 1980 requested the Defendants to keep the matter pending as Plaintiff No.1 was verifying from the shipping company the exact date of arrival of the steamer as alleged in paragraph 11 of the written statement ?

58. It will be convenient to deal with issue No.7 before issue No.6. I have earlier referred to the letter dated 22/2/1980 (Exhibit B8 - the original is at Exhibit 2). By this letter the Plaintiffs informed the Defendants that the first set of documents negotiated under the L/C were not acceptable to them due to the discrepancies mentioned therein. The dispute is whether the endorsement on the letter alleged to have been made by/on behalf of original Plaintiff No.1 was actually made or not. The endorsement, quoted by me earlier, requested the Defendants to keep the matter pending as the Plaintiffs were verifying from the shipping company the exact date of arrival of the steamer. The Defendants assert that the endorsement was made. The Plaintiffs denied the endorsement. Whether the endorsement was made or

not, it will make little difference to the outcome of the suits for reasons I shall state later.

59. In support of the case of the endorsement having been made, Mr.Mody relied upon the following averment as constituting an admission, in paragraph 18 of the suit :-

> "The Plaintiffs say that there was no made (mention) in the said letter but on the copy of the letter with the Defendants the representative of the Original Plaintiff No.1 had stated that the documents night (might) be withheld for a short while and in fact the Original Plaintiff no.1 had asked the Defendants to return the documents by the letter dated 3/3/1980."

60. The submission is unfounded. There is no admission as contended by Mr.Mody. This is clear on reading the paragraph as a whole and not by merely extracting the above sentence. The portion of paragraph 18 which precedes the above quotation refers to the Defendants letter dated 29/10/1981. The Plaintiffs further referred to the contents of that letter by which the Defendants stated that they had been able to prevail upon the negotiating bank to refund US$ 39,644 pertaining to the second negotiation. The Plaintiffs in paragraph 18 further referred to the contents of the letter dated 29/10/1981 to the effect that the Defendants had retained the documents and had not intimated the negotiating bank about non-acceptance of the documents as required under the UCP as per "the specific request conveyed by original Plaintiff No.1 vide their letter dated 22/2/1980". Immediately after this,

follows the sentence quoted above. It is clear that the sentence relied upon by Mr.Mody contained a typographical error namely the word `but' was a typographical error for the word `that'. This is clear from the fact that in the sentence the Plaintiffs have averred that there was no mention “in the said letter” which can only mean the letter dated 29/10/1981. It is clear that by the sentence which I have quoted what was sought to be conveyed was that the letter dated 29/10/1981 did not mention that on the copy of the letter dated 22/2/1980 the endorsement had been made.

61. The least that could be said is that the admission is not clear. The sentence could be construed both ways. Considering the fact that in the correspondence between the parties the Plaintiffs had disputed the endorsement it cannot be stated with any degree of certainty that the averment ought to be read as suggested by Mr.Mody. This is buttressed by the fact that in paragraph 10 of the Written Statement filed by the Plaintiffs to Suit No. 873 of 1983, they categorically denied the Plaintiffs assertion in the plaint regarding the endorsement.

62. There is therefore no admission on the Plaintiffs' part of the endorsement having been made. The question therefore must be decided on the balance of probabilities.

63(A). What is important to note is that the plaint has been verified by Moti D. Dadlani. The written statement to the Defendant's Suit No. 873 of 1983 was also verified by Moti D. Dadlani. Moti Dadlani is alive and was available as a witness. The cross-examination of the Plaintiffs witness in fact establishes

that Plaintiff No.2 is being managed by Moti D. Dadlani and that he is carrying on business from Tardeo. (Questions 10 and 11). On the question of the endorsement Moti D. Dadlani ought to have been examined. The Plaintiffs however failed to examine him. The Plaintiffs witness admittedly had no personal knowledge of the endorsement. It will be legitimate to draw an adverse inference against the Plaintiffs to the effect that had Moti T. Dadlani been examined his evidence would have established that the endorsement had been made.

(B). The cross-examination of the Plaintiffs witness no doubt did bring out certain inconsistencies in the stand and the explanations were not quite cogent (Question 38 to 40, Question 63 and 64). I am however unwilling to draw any inference against them for that reason alone.

64. Mr.Mody further invited me to exercise my power under Section 73 of the Indian Evidence Act by comparing the initials below the endorsement with the admitted initials on record.

65. Both sides had not examined hand-writing experts. In the facts and circumstances of this case, I am inclined to exercise this power. Before doing so it would be useful to refer to the following observations of the Supreme Court in the case of *Murari Lal v. State of M.P., (1980) 1 SCC 704 :-*

> **"12.** The argument that the court should not venture to compare writings itself, as it would thereby assume to itself the role of an expert is entirely without force. Section 73 of the

> Evidence Act expressly enables the court to compare disputed writings with admitted or proved writings to ascertain whether a writing is that of the person by whom it purports to have been written. If it is hazardous to do so, as sometimes said, we are afraid it is one of the hazards to which Judge and litigant must expose themselves whenever it becomes necessary. There may be cases where both sides call experts and two* 7 voices of science are heard. There may be cases where neither side calls an expert, being ill able to afford him. In all such cases, it becomes the plain duty of the court to compare the writings and come to its own conclusion. The duty cannot be avoided by recourse to the statement that the court is no expert. Where there are expert opinions, they will aid the court. Where there is none, the court will have to seek guidance from some authoritative textbook and the courts own experience and knowledge. But discharge it must, its plain duty, with or without expert, with or without other evidence. We may mention that *Shashi Kumar* v. *Subodh Kumar*6 and *Fakhruddin* v. *State of M.P.*6 were cases where the Court itself compared the writings."

66. A mere perusal of the initials below the endorsement establishes that it is identical to the initials at Exhibits 8G, 8M and 8B. The receipt of these documents has not been denied. The initials below these documents have also not been denied. It is true that the identity of the person whose initials appear in the aforesaid agreements is not established. However that the initials

were appended on behalf of original Plaintiff No.1 is not disputed.

67. In the circumstances it must be held that the initials below the endorsement were made by/on behalf of original Plaintiff No.1 as they appear to be the same as those of the person who initialled the aforesaid documents on behalf of the original Plaintiff No.1.

68. Two documents dated 28/2/1980 and 4/3/1980 were marked `X' and ` X1' for identification. By consent of the parties during arguments the same were marked Exhibits B-27 and B-28 respectively. Exhibit B-27 is the letter dated 28/2/1980 addressed by original Plaintiff No.1 to the Manager of the agents of the Vessel inquiring about the exact arrival date of the ship at the Bombay Port. By a letter dated 23/3/1980 (Exhibit B-9) addressed to the Defendants, original Plaintiff No.1 stated that upon verification they had found that the vessel had arrived in December 1979.

69. Mr.Mody, submitted that the fact that inquiries had been made by the Plaintiffs established that the endorsement had been made. According to him, if the endorsement had not been made the Plaintiffs having rejected the documents in view of the discrepancies would not have found it necessary to make the said inquiries. I am unable to agree. Even if the endorsement had not been made, it would not have been at all improbable for the Plaintiffs to have ascertained the date of arrival of the ship. They could have well done so to further strengthen their case regarding the documents containing discrepancies and the shipment having arrived in Bombay Port even before the opening of the L/C.

70. In the circumstances, I am of the view that on a balance of probabilities it must be held that the endorsement was made. Issue No.7 is therefore answered in the affirmative.

RE: ISSUE NO.8

> 8. Whether the Defendants prove that they were informed by the partner of Original Plaintiff No.1 that the dispute with the beneficiary is with regard to the demurrage and that they were expected to settle the same with the beneficiary of the letter of credit as alleged in paragraph 11 of the written statement ?

71. The answer to issue No.7 has a clear bearing on Issue No.8. It is only logical that the endorsement would have been made in view of the Plaintiffs attempting to resolve the matter with the beneficiary. It is probable then that the Plaintiffs would have informed the issuing bank/Defendant of the same.

Issue No.8 is therefore answered in the affirmative.

PREFACE TO THE REMAINING ISSUES :

72. It is convenient to preface a consideration of the remaining issues namely issue nos.6 and 9 to 14 by examining the relationship and the rights and obligations between the parties, the negotiating bank and the beneficiary.

73. I have held that there were discrepancies in the documents, that the beneficiary did not negotiate the L/C in accordance with its terms, and that Chemical Bank i.e. the intermediary bank wrongly accepted the documents and made

payment to the beneficiary despite the same. I have also held that original Plaintiff No.1 and the Defendants had correctly rejected the documents and that Chemical Bank wrongly debited the Defendants' account with the amounts paid by them to the beneficiary.

74. It is of crucial importance to note that the effect of the negotiating bank debiting the Defendants account is that the Defendants had been forced to pay the amounts to the negotiating bank, Chemical Bank. In other words the Defendants did not voluntarily make payment to Chemical Bank. Thus neither the Defendants nor original Plaintiff No.1 was at fault.

The question is whether in these circumstances the Defendants are entitled to claim the amounts wrongly debited by Chemical Bank pursuant to the wrongful negotiation of the L/C by the beneficiary with the negotiating bank.

75. Mr.Mody submitted that the Defendants were entitled to recover from the Plaintiffs the amounts recovered from them by the Chemical Bank on two grounds.

76. The first was based on the following clause of the application for opening the L/C (Exhibit 1). The relevant part of the application (Exhibit - 1) relied upon by Mr.Mody, reads as under :-

> "In Consideration of your opening a Letter of Credit as above, I/We hereby undertake to accept and pay in due course all drafts drawn within the terms thereof and/or to take up and pay for all documents negotiated thereunder on presentation and in default of my/our so doing you may sell

> the goods before or after arrival and I/We undertake to reimburse you for any shortfall that may occur and I/We hereby undertake forthwith on demand made by you in writing to deposit with you such sum or security or further sum or security as you may from time to time specify as security for the due fulfillment of our obligations hereunder and any security so deposited with you may be sold by you on your giving reasonable notice of sale to us and said sum or the proceeds of sale of the security may be appropriated by you in or towards satisfaction of our said obligations and any liability of ours arising out of the non-fulfillment thereof.

77. I do not find Mr.Mody's submission to be well founded. The undertaking to accept and pay in due course all drafts is not unqualified. The undertaking operates only when such drafts are drawn within the terms “thereof” meaning thereby the L/C. I have already held that the beneficiary had not negotiated the L/C in accordance with the terms thereof. Further, the undertaking of the Defendants was to take up and pay for all the documents negotiated thereunder on presentation. I think it is obvious that the parties were ad-idem that the negotiation under the L/C ought to have been in accordance with law and in accordance with the L/C. I cannot read the clause as a blanket undertaking to make payment even in the circumstances where the parties did not negotiate the L/C in compliance with the terms thereof.

78. Mr.Mody then relied upon Article 12 of the Uniform Customs and Practices for Documentary Credits (1974 Revision)

International Chamber of Commerce, Public Issue No.290 which reads as under :-

> "Article 12
>
> a. Banks utilising the services of another bank for the purpose of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of the latter.
>
> b. Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank."

79. Both counsel proceeded on the basis that the L/C and the agreement between original Plaintiff No.1 and the Defendants were governed by the UCP.

80. What falls for consideration then is the effect of Article 12 on the rights and liabilities of the Plaintiffs on the one hand and the Defendants on the other assuming that both original Plaintiff No.1 and the Defendants had rightly rejected the documents and that the negotiating bank had wrongly permitted the operation of the L/C by the beneficiary and also wrongly debited the Defendants account.

81. Article 12(a) is not a contract of guarantee/surety as that would require a tripartite agreement. Article 12(a) constitutes an indemnity by the applicant for the credit in favour of the issuing bank. Article 12 constitues an indemnity by original Plaintiff No.1

in favour of the issuing bank/Defendants for the issuing bank/Defendants utilised the services of the Chemical Bank “for the account and at the risk of ” original Plaintiff No.1. The words “at the risk of such applicant” constitute an implied if not an express indemnity by the applicant for the L/C i.e. original Plaintiff No.1 in favour of the issuing bank i.e. the Defendants to hold them harmless from any act on the part of the intermediary/negotiating bank i.e Chemical Bank.

82. The plain language of Article 12 is simple and clear. The expression in Article 12, “for the account and at the risk of ” clearly indicates that in respect of any dealings between the issuing bank and the negotiating bank, the former not only assumes no responsibility but does so for the account and at the risk of the applicant. It is important to note the distinction in the language between Articles 12(a) and 12(b).

As per Article 12(b) the bank assumes no liability or responsibility, should the instructions they transmit not be carried out by the other bank. Thus no action would lie against the issuing bank for consequences which arise on account of their instructions not being carried out by the other bank. The clause is obviously founded in view of the principle of agency. Normally the principle is responsible for the acts of his agent. It is for this reason probably that Article 12(b) provides that the banks assume no liability or responsibility even if they have themselves taken the initiative in the choice of such other bank.

Article 12(a) goes a step further than merely absolving

the issuing bank of any such liability or responsibility. A contrary view would render the words “for the account and at the risk of ” otiose.

83. The words “for the purpose of giving effect to the instructions of the applicant for the credit” are wide and cover the entire transaction pertaining to the L/C including the operation/ negotiation thereof by the intermediary, negotiating or advising banks. I see no reason to curtail the ambit and scope of such an indemnity when the plain language thereof does not warrant the same.

84. Banks, like any other party, have their own difficulties against which they would understandably desire to safeguard themselves. They are entitled to do so. Article 12 constitutes a contract of indemnity. There is nothing either in principle or in law which disentitles them from obtaining an indemnity inter-alia against the acts of the negotiating bank in consideration of their opening an L/C. Banks understandably may not wish to take upon themselves any risk or liability on account of the acts of intermediary/negotiating/advising banks. To that end, they may obtain an indemnity by incorporating Article 12 of the UCP in the agreement with the applicant for the L/C.

85. The authorities and legal texts I shall refer to hereafter were not cited before me. I however made them available to both counsel and permitted them to address me on the same.

86. In the fourth edition of Benjamin's Sale of Goods, Article 20 of the 1983 Revision of the UCP which corresponds to Article 12,

was construed thus :-

> **"23-082. Responsibility for acts of correspondent -**
> The engagements of a correspondent banker for the opening of a documentary credit involves certain risks. .... Under Article 20, if the issuing banker utilises the services of a correspondent banker, he does so at the buyer's risk and account and assumes no liability if the correspondent banker does not carry out instructions transmitted to him. This provision appears wide enough to protect the issuing banker against responsibility for the negligence of the correspondent banker and applies even if the issuing bank has taken the initiative in selecting the correspondent. Under the last paragraph of article 20, the buyer is bound by and liable to indemnify the issuing banker and the correspondent banker against all obligations and responsibilities imposed by foreign law and by usages." (emphasis supplied.)

I am in respectful agreement with the view.

87. A Learned Judge of the Queen' s Bench Division (Commercial court) in *Credit Agricole vs.Generale Bank, (2000) 1 Lloyd' s LR, 123,* construed Article 18(a) of the U.C.P. for Documentary Credits No.500 which is similar to Article 12(a), thus:-

> "It was Generale's case that the effect of Article 18(a) was that, if the documents were discrepant, then Indosuez's acceptance of them was at the risk of Seco/Considar. This approach

> received some support from a passage in Benjamin, Sale of Goods, 5th Ed.,par.23-158.
>
> I unhesitatingly prefer the contrary view expressed in Jack, Documentary Credit, 2nd Edn., para 4.18 to the effect that Article 18 does not require an applicant to accept and pay for documents which do not comply with his instructions. The sole effect of Article 18 is to prevent an applicant holding an issuing bank liable for damage caused to the applicant by the action of the bank instructed by the issuing bank. Any other construction would, to put it at its lowest, be surprising in that it would be relieving the issuing bank of any need to determine compliance pursuant to Article 14 of the UCP."

At first blush and on a reading of the extract by itself the judgment appears to restrict the ambit of Article 18(a)/12(a). A reading of the entire judgment however places it in perspective. So read I do not think the learned Judge intended curtailing the ambit of the Article. In fact the judgment considered a situation entirely different from the one that falls for my consideration.

88. As the learned Judge relied upon the commentary in Jacks Documentary Credits it would be convenient to deal with the same before considering the judgment itself.

89. Jacks Documentary Credits, 1991 Edition relied upon by the Learned Judge deals with Article 18 of the UCP 1983 Edition.

The author sets out Article 18 of the 1993 Revision,

clauses (a) and (b) whereof are identical to clauses (a) and (b) of Article 12. The construction of Article 18 is contained in paragraph 4.18 of the commentary. I have found it convenient to deal with the commentary in three parts. The first part reads as under :-

> "At a first reading the intended effect appears to be that, whatever the advising bank does, it does at the risk of the applicant and not of the issuing bank. It is to be remembered that the applicant has no contract with the advising bank, and it is at the best doubtful whether it has any rights against it. The most common error made by advising banks is to pay against documents which do not conform to the credit. When that happens, it should be picked up by the issuing bank when it in its turn receives and inspects the documents. The consequence then will be that, unless the applicant is nonetheless prepared to accept the documents, the issuing bank will return them to the advising bank and will refuse to reimburse the advising bank. If the issuing bank fails to spot the error, the applicant will be entitled to refuse the documents when it receives and examines them. It cannot be the intention of Article 18 to alter the outcome in either of those situations. It will be noted that they resolve themselves because the bank at fault carries the loss because it has paid out and has no right to reimbursement."

90. It is to be noted that the situation contemplated in this part of the commentary is one where the issuing bank fails to spot the error and the applicant refuses the documents. There can be

no doubt that in such a situation the applicant is entitled to refuse the documents. It can hardly be suggested that the Article indemnifies

the issuing bank when it is at fault. The other situation contemplated is where the bank notices the error and returns the documents to the advising bank refusing to reimburse the advising bank. In this situation, obviously there can be no question of the applicant being called upon to pay under the credit for the issuing bank itself has refused to pay the same to the advising bank.

91. The second part of the commentary is not relevant to the question under consideration. It deals with the principle of agency where the issuing bank pays, as it is bound to, on the principle of agency. The commentary reads as under :-

> "Where it is another bank which is to pay, Article 18 can be argued to shift the loss onto an innocent party, the applicant. Where the advising bank advises the credit with an error, such as the omission of one of the documents which the applicant specified to be those against which payment should be made, and the credit provides for payment to be made not by the advising bank but by the issuing bank or another bank nominated by it, the issuing bank will be bound by the advice of the credit. For it will have been made by its agent acting within that agent's ostensible authority. The beneficiary will be entitled to payment. Article 18.a appears to have the effect that in such a situation the payment would be 'for the account and at the risk of'

> the applicant. If so, he would be bound to accept and pay for documents which did not comply with his mandate to the issuing bank, despite the fact that the clear negligence of the correspondent or advising bank as the agent of the issuing bank would give the issuing bank a right of reimbursement against it. Had the issuing bank made such an error itself, the liability would of course rest with it. A similar situation arises where the error by the advising bank is not as to the terms of the credit but in accepting documents which do not in fact comply with the terms as correctly advised, and payment is to be made by another bank. In accepting the documents the advising bank will have acted as the agent of the issuing bank and will bind it, and the beneficiary will be entitled to his payment."

92. The third and the last part of the commentary which was relied upon in *Credit Agricole v. Generale Bank*, reads as under:-

> "Again, Article 18 may be argued to have the effect that the applicant for the credit would be bound to accept and pay for documents which did not comply with his instructions, and even though the issuing bank would have a remedy against the bank actually at fault. It is surprising if it is the intention of Article 18.a to enable banks to avoid responsibility in these situations. Unless its wording clearly requires that result, it is suggested that it should not be construed as doing so. An alternative construction of the Article is that its effect is to prevent an

> applicant holding an issuing bank liable in damages for any loss caused to the applicant by the action of a bank instructed by the issuing bank: it does not enable the issuing bank to pass on to the applicant liability which would otherwise rest with the banks. The issue is touched on in terms which support this second construction in a very brief decision of the ICC Banking Commissions where the Commission stated that the Article's predecessor exonerated the issuing bank for the errors of the advising bank, provided that the issuing bank had not been guilty of negligence itself. The word ' exonerated' does not suggest that the Article enables a bank to require an applicant to accept and pay for documents which do not comply with the applicant's instructions. ' Exoneration' and 'immunity' are the words in the commentary on the Article in the ICC's UCP 500 and 400 Compared. This confirms that the intended effect is only to prevent the issuing bank from being liable in respect of the errors of a correspondent bank unless the issuing bank has itself been negligent ."

93. It is crucial to note that a situation such as the one before me was not dealt with either by the learned author or in *Credit Agricole*. The author, it appears on a reading of the commentary as a whole and not any particular sentence or sentences thereof, was concerned with the responsibilities of banks - meaning thereby, situations in which both the banks, including the issuing bank were at fault. There is no question of the Applicant/original Plaintiff No.1 being bound to accept and pay

for the documents, though they did not suggest the same. Nor have I come to the conclusion that original Plaintiff No.1 was bound to have accepted the documents and paid for them. They quite clearly were not as the documents did not conform to the credit and contained discrepancies. Further, there is no doubt that the Defendants as the issuing bank had a remedy against the intermediary bank/Chemical bank. The situation before me however is entirely different. The issuing banks/the Defendant's account was adjusted to wit there was a forced payment. There was a forced and not a voluntary payment by the Defendants to Chemical Bank. The question, as I have noted, is whether in such circumstances, the Defendants are entitled to an indemnity, created by Article 12.

94. The second sentence in the third part of the extract suggests that the author was considering a situation where the banks were avoiding their responsibilities. In the present case however, there is no question of the Defendants having avoided their responsibilities. Indeed, if I am correct in what I have held viz. that the Defendants discharged their responsibilities under the credit, there is no question of their having avoided their responsibilities.

95. There cannot be any doubt that if the issuing bank fails to spot the error of the documents not conforming to the credit, Article 12(a) cannot possibly come to its assistance. This is for the obvious reason that being in breach it cannot possibly foist any liability on the applicant. It is the observation that it cannot be the

intention of Article 12 to alter the outcome in either of the situations that causes some difficulty. The other situation is where the advisee/negotiating bank pays against the documents which do not conform to the credit. It must be noticed however that the author was dealing with a situation entirely different from the one before me. The observation was in the context of a situation where the negotiating bank pays against the documents which do not conform to the credit but the issuing bank in its turn rejects the documents and refuses to reimburse the advising bank. Thus the author was dealing with a situation where payment not being required to be made is in fact not made by the issuing bank to the negotiating bank. In such a situation there would indeed be no question of the bank being required to plead any right or defence under Article 12 for the negotiating bank would have to sue the issuing bank to recover monies. In such an action, the issuing bank would have full opportunity of establishing that the documents do not conform to the credit and hence payment is not required to be made.

96. The case before me is entirely different. The Defendants had an account with the negotiating bank who debited the same. The effect therefore was that payment was not made by the Defendant pursuant to any demand by the negotiating bank voluntarily. The negotiating bank wrongfully appropriated the amounts of the Defendants lying with it. Had the Defendants actually made payment to the negotiating bank it would have been an entirely different matter. The commentary in Jacks,

Documentary Credit would certainly then have been of assistance to the Plaintiffs. Neither the commentary in Jacks Documentary Credit nor the judgment in Credit Agricole (supra) deals with a situation such as the one in the present case.

97. An alternative construction is placed on the Article by the author. The construction may be well founded specially, based on Article 18(b)/Article 12(b). I am unable, however, to hold that the construction is an alternative to the one I have suggested to Article 12(a)/18(a). Indeed, I do not construe the commentary, as meaning that either. The construction that I have placed on Article 12(a)/Article 18(a) certainly does not enable the banks to avoid their responsibilities. Nor does it enable issuing banks to pass on to the applicant' sliability, which would otherwise rest with the banks - note the plural. Even the decision of the ICC Banking Commission, noted in the commentary exonerated the issuing bank providing that the issuing bank was not guilty of negligence itself. All this to me, suggests that the commentary is confined to situations in which the issuing bank is also at fault and not to situations such as the one before me, where the issuing bank was not at fault. It had discharged all its obligations under the credit and had not made the payment voluntarily.

98. Finally, if my understanding of the commentary is incorrect and that the learned author has opined that the alternative construction is the only construction, I am with respect, unable to agree. It curtails and reduces the scope and ambit of Article 18(a). The language of Article 18(a) is simple and clear and

I see no justification either in principle or as a rule of interpretation, justifying the same.

99. It is essential to read the decision in *Credit Agricole v. Generale Bank*, carefully and fully. Reading the portion extracted above, could possibly lead to a misunderstanding of the judgment. The letter of credit was opened by the Generale Bank. Seco Trading Inc. (Seco) and Considar Inc. (Considar) were third parties in the proceedings. The Defendants entered into a letter of credit agreement with some members of a group which included Considar but not Seco. By the agreement, Considar undertook to reimburse the Defendant in respect of payments made under letters of credit, opened at Considar's request.

Seco entered into a contract with Midland Resources Ltd. for the purchase of certain goods, payment for which was to be made by an irrevocable L/C. Considar made an application to the Defendant for the issue of an L/C, with Midland as the beneficiary. The L/C was issued and its terms were telexed to the Plaintiffs requesting them to advice the beneficiary, without adding their confirmation.

The Plaintiffs considered the negotiation of the L/C by Midland to be proper, paid Midland, and claimed reimbursement from the Defendant. The Defendant rejected the documents for various reasons. It is important to note that the reasons furnished by the Defendant were held to be misconceived.

The Defendants in the third party proceedings against Seco and Considar, asserted that in the event of the documents

being held to be discrepant, they were nonetheless entitled to the indemnity from Seco/Considar by reason of the L/C agreement and also by reason of Article 18 of the UCP No.500 which corresponds to Article 12 under consideration by me in this case.

The learned Judge came to the conclusion that the documents submitted were discrepants in the manner alleged by the Seco/Considar, though not as alleged by the Defendant. Thus, qua the advising bank, i.e. the Plaintiffs, the learned Judge rejected the Defendant's contentions. The question then arose of considering the Defendant's claim of indemnity against the third parties – Considar and Seco. The learned Judge came to the conclusion that the documents were discrepant, as alleged by Considar/Seco. The Defendant contended that even if this was so, they were entitled to an indemnity in view of Article 18(a). It is in this context, that the learned Judge rejected the claim for indemnity based on Article 18(a).

It is to be noted that the claims for indemnity in these circumstances, could never succeed because the Defendant was itself in default. Moreover the Defendant had, in any event, failed to comply with their obligations under Article 14 as regards making of the documents available to the Plaintiffs and by entering into the tripartite agreement. It is also important to note that the learned Judge held that the Defendants had failed to comply with other requirements under the UCP which was admittedly made a part of the contract, as regards making the documents available to the Plaintiffs. In fact, despite contending that the documents were

discrepant, the Defendant entered into a tripartite agreement with Seco and Considar and used the same documents for the purposes of sale of the goods.

100. I am however, with great respect, unable to accept that the view expressed in Jack's Documentary Credit is contrary to the view expressed in *Benjamin's Sale of Goods*. I have already dealt in detail with the commentary in Jack's Documentary Credit. If I am correct in my construction, then the commentary by the two authors can easily be reconciled. Nor can I, with respect, agree with the learned Judge that the "the sole effect" of Article 18 is to prevent an applicant holding an issuing bank liable for damage caused to the applicant by the action of the bank, instructed by the issuing bank. While this could be one of the effects of Article 18, it is certainly not the sole effect thereof.

101. Seen in this context, I do not think that the learned Judge meant to exclude the operation of the indemnity in a situation such as the one before me. If, however, this was the intention, I am unable to agree with the same.

102. The 6th edition of *Benjamin's Sale of Goods* retains the commentary in the fourth edition verbatim. It only adds one sentence, referring to the decision in *Credit Agricole v. Generale Bank* which reads as under :-

> "Article 18 does not preclude the applicant from contesting in a dispute with the issuer the regularity of documents accepted by the correspondent as a regular tender."

The author certainly does not concede the view held in

the earlier editions in view of the judgment in *Credit Agricole*. The effect of the contest in a dispute with the issuing bank, would naturally depend upon the facts and circumstances of each case.

103. In Gutteridge and Megrah's Law of Bankers' Commercial Credits (Eighth Edition) after setting out Article 18 which is identical to Article 12 of the edition of the UCP under consideration and quoted above, the author proceeds in paragraph 4-68 as follows :-

> "Sub-articles (a) and (b) appear to make the buyer responsible for any mistake on the part of a bank instructed by the issuing bank, whatever may happen in respect of the credit transaction. Their effect is, however, limited to relieving the issuing bank of liability for damage caused to the buyer by the actions of the bank instructed by the issuing bank. It does not enable the issuing bank to claim reimbursement or an indemnity from the buyer where the buyer's instructions have not been carried out."

The foot note to the last two sentences is a reference to the judgment in *Credit Agricole Indosuez v. Generale Bank (2000) 1 Lloyd's Rep 123 at 128*. which I have already dealt with.

104. Article 12 does not limit the nature and kinds of risk that may be involved. There is nothing in Article 12(a) which excludes from its ambit a situation such as the present one where the negotiating bank appropriates the amounts of the issuing bank lying with it. In the circumstances, in view of Article 12(a), the Defendants had been indemnified by original Plaintiff No.1 against

all risks arising out of the dealings of the Defendants with the negotiating bank, Chemical Bank.

105. This brings me to another aspect of the matter. In Gutteridge the first part of paragraph 4-68 reads :-

> "4-68 The intermediary bank may be chosen, as between the buyer and the issuing bank, by the buyer (following agreement with the seller) or by the issuing bank. If the former, the buyer takes the risk of the intermediary bank failing to act in accordance with his requirements as laid down in the credit. In the latter case, the buyer normally relives the issuing bank from responsibility. In this connection article 18 of the UCP provides :"

106. It is necessary therefore to consider which of the parties appointed the intermediary bank. The Plaintiffs contended that the Defendants appointed the negotiating bank and the Defendants contended that original Plaintiff No.1 did.

107. It is true that the actual appointment of the negotiating bank was by the Defendant. However that was clearly at the instance of original Plaintiff No.1.

108. By a letter dated 4/1/1980 (Exhibit B-3) Jai Vikas, agents of the beneficiary in India requested original Plaintiff No.1 to open the L/C. By clause 12 of the letter Jai Vikas instructed the Defendants inter-alia as follows :-

> "The credit is to be established at the earliest and preferably the negotiating bank should be Chemical Bank, New York."

109. Accordingly by the Application and Guarantee for the L/C dated 11/1/1980 (Exhibit 1), original Plaintiff No.1 requested the Defendants to establish the L/C. In that application, original Plaintiff No.1 requested the Defendants to establish the L/C with Chemical Bank, New York i.e. the negotiating bank. The Defendants complied with the request. It is thus clear that the negotiating bank was appointed at the instance of original Plaintiff No.1 and not at the instance of the Defendants. Indeed it would not have been necessary for the Defendants to appoint any other correspondent in New York for they had a branch in New York.

110. Original Plaintiff No.1 having chosen the intermediary bank/Chemical Bank relieved the Defendants from the responsibilities of the acts of the Chemical Bank.

RE: ISSUE NOS.6 AND 12

6. Whether the Plaintiffs prove that the Defendants were not entitled to claim indemnity and reimbursement from the Plaintiffs for the reasons alleged in paragraph 27 of the Plaint ?

12. Whether the Defendants were bound to initiate legal action against the correspondent bank and the beneficiary of the letter of credit as alleged by the plaintiffs in paragraph 24 of the plaint ?

111. Mr.Kinkhabwala submitted that the Defendants ought to have filed a suit against the negotiating bank to recover the amounts wrongly appropriated by the negotiating bank. Mr.Kinkhabwala submitted that otherwise it would be grossly unfair

to the Plaintiffs who have no remedy against the negotiating bank.

112. The argument proceeds on a misconception of the rights of the indemnifier. It is therefore necessary to consider the same.

113. Sections 124 and 125 of the Indian Contract Act read as under :-

> **"124."Contract of indemnity defined".-** A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "Contract of Indemnity".
>
> **125. Rights of indemnity holder when sued .** - The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor -
>
> (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnity applies ;
>
> (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit ;
>
> (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it

> would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit."

114. In *Gaganan Moreshwar vs. Moreshwar Madan* reported in AIR (29) 1942 Bom 302, Chagla J. has held as under :-

> "If the whole law of indemnity was embodied in Section 124 and 125, Contract Act, there would be considerable force in the contention of Mr. Tendolkar but this is obviously not so. The Contract Act is both an amending and a consolidating Act, and it is not exhaustive of the law of contract to be applied by the Courts in India. Section 124 deals only with one particular kind of indemnity which arises from a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnified himself or by the conduct of any other person, but does not deal with those classes of cases where the indemnity arises from the loss caused by events or accidents which do not or may not depend upon the conduct of the indemnifier or any other person, or by reason of liability incurred by something done by the indemnified at the request of the indemnifier. In the present suit the indemnity arises because the plaintiff has become liable owing to something which he has done at the request of the defendant and therefore, in my opinion, Section 124 does not apply at all to the facts of this case. Further Section 125 as the marginal note indicates, only deals with the rights of the indemnity-holder as I shall presently point out. The

> indemnity-holder has other rights besides those mentioned in Section 125. "

115. The rights of the indemnifier have not been exhaustively dealt with in the Indian Contract Act. The rights conferred on a surety under Section 141 have not been conferred expressly on an indemnifier. Section 141 reads as under :-

> **"141.Surety's right to benefit of creditor's securities . -** A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not ; and if the creditor loses or, without the consent of the surety parts with such security, the surety is discharged to the extent of the value of the security."

116. The question is whether rights similar to section 141 are available to an indemnifier. In **Maharana Shri Jasvat Singhji Fatehsinghji vs. The Secretary of State for India reported in ILR 1890 (4) Bom.299** the Division Bench held as under :-

> " The principle which the counsel for plaintiff asks us to apply is that "well-known" principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss.
>
> The Indian Contract Act, IX of 1872, section 141, applies this principle to the contract of

> suretyship: but sections 124 and 125, which deal with the contract of indemnity, are silent on this point' only the rights of the promisee are stated; those of the promisor are not mentioned. The learned counsel for the plaintiff did not notice this ommission when arguing for the application of the doctrine of subrogation. In the absence of reported decisions, I am of the opinion that the doctrine is to be applied for the following reasons. It is an essential part of the law about indemnity. It is clearly based on natural equity, and is thus of general application. The Indian Contract Act does not impair it, and is itself only a partial measure, as the preamble shows." (emphasis supplied)

117. This judgment clearly holds that the indemnifier is entitled to all the rights which the indemnified had. Applying the principle to the facts of the present case, it would follow that the Plaintiffs i.e. the indemnfiers were entitled to step into the shoes of the Defendants i.e. the indemnified qua Chemical Bank i.e the intermediary/negotiating Bank and/or Ocilac Inc. the beneficiaries of the L/C. This is despite the fact that the Plaintiffs did not have any privity of contract with either of them and would therefore not be entitled to maintain an action against them independently of the right of subrogation conferred on them as aforesaid.

118. Mr.Mody relied upon the judgment of the Andhra Pradesh High Court in the case of *Hindustan Corporation (Hyderabad) Pvt. Ltd. vs. United India Fire General Insurance Co. Ltd.,* reported in AIR 1997 A.P. 347. The Division Bench of the

Andhra Pradesh High Court followed the Division Bench judgment of this Court in Gajanan Moreshwar (supra). The judgment considers in detail the common law as enunciated in various decisions of the English Courts. The learned Judges held that the decisions enunciate the principle of subrogation as an incident of contract of indemnity involved in the policy of insurance whether it be marine policy or fire policy or motor policy or any other policy incorporating the contract of indemnity. I am with respect, in agreement with the judgment and in any event bound by the judgment of this court in *Maharana Shri Jasvatsinghji Fatehsinghji* (supra).

119. The next question therefore is when and how the indemnifier/original Plaintiff No.1 could have acquired the right of subrogation. This aspect too is not dealt with in the Indian Contract Act. It obviously cannot be dealt with by the Indian Contract Act as, as observed earlier, the right of subrogation in respect of a contract of indemnity is itself not dealt with in the Indian Contract Act.

120. Section 140 of the Contract Act reads as under :-

> "S. 140. Rights of surety on payment or performance.-
>
> Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor has against the principal debtor." (emphasis supplied)

121. On a parity of reasoning and on principles analogous to Section 140, the rights of the indemnifier to step into the shoes of the indemnified would accrue upon the former making payment to the latter. Further in the first sentence of the part of the judgment in Maharana Shri Jasvat Singhji Fatehasinghi' scase quoted earlier, it is held that the indemnifier will "on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss".

122. In *Hindustan Corporation Pvt. Ltd. Versus United Fire and General Insurance Co. (supra),* the Division Bench of the Andhra Pradesh High Court referred with approval to the following passage from the judgment of Lord Blackburn in the case of Burnand versus Rodicanchi (1882) 7 AC 333 :-

> "It will be observed that the whole basis of the subrogative doctrine is founded on a binding and operative contract of indemnity, and that it is from such a contract only that the equitable results and rights as indicated above derive their origin.
>
> ..... The principle of subrogation is ever a latent and inherent ingredient of the contract of indemnity, but that it does not become operative or enforceable until actual payment be made by the insurer. It derives its life from the original contract. It gains operative force from payment under that contract. Not till payment is made does the equity, hitherto held in suspense, grasp and operate upon the assured's choses in action. In my view

> the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity."

123. Admittedly in the present case, original Plaintiff No.1 did not make payment of the amounts debited by the Chemical Bank in respect of the Defendants account. Admittedly again, original Plaintiff No.1 never offered to even put the Defendants in funds while calling upon the Defendants to take action against Chemical Bank. In the circumstances, there was no obligation upon the Defendants to institute proceedings against Chemical Bank to recover the amounts wrongly debited by the negotiating bank.

124. In the circumstances, Issue Nos. 6 and 12 are answered in the negative.

RE: ISSUE NO.9

> 9. If the answer to Issue No.7 is in the affirmative, whether the Defendant was entitled to claim reimbursement or indemnity from the Plaintiffs even assuming that the answer to Issue Nos.4 and 5 are in the affirmative ?

125. Issue No.9 is a non-sequiter. It is not the Plaintiffs' case that there was any delay on the part of the Defendants in rejecting the documents. Nor is it the Defendant's case, even assuming that the endorsement was made on the letter dated

22/2/1980, that original Plaintiff No.1 held on to the documents for an unreasonably long period of time and that as a result thereof, the Defendants were unable to reject the documents in time. This question was not put in issue at all. Even the Chemical Bank/negotiating Bank did not contend that the documents were rejected due to any delay in their being returned/rejected. Their contention throughout was that the documents negotiated by the beneficiary, was in accordance with the terms of the L/C.

126. Thus the Defendants were entitled to reimbursement and indemnity from the Plaintiffs even though I have answered Issue No.4 and 5 in the affirmative.

127. Issue No.9 is therefore answered in the affirmative.

RE.ISSUE NO.10

10. Whether the Defendants were negligent as alleged in paragraph 27 of the plaint ?

128. It is true that the Defendants have wrongly contended in the proceedings that the rejection of the documents by the Plaintiffs was improper. The fact however is that the Defendants did everything that was necessary for them as the issuing bank to reject the documents. I have while dealing with Issue Nos.4 and 5 demonstrated that the Defendants themselves had admitted that the documents did not conform to the L/C. I have also demonstrated that the Defendants had in fact rejected the documents and forwarded the same to the negotiating bank. There

was no negligence whatever on the part of the Defendants in this regard. The final rejection of the documents by original Plaintiff No.1 was by a letter dated 3/3/1980. The Defendants immediately in turn rejected the documents by their communication to Chemical Bank. It was never either the Plaintiff's case or the case of Chemical Bank that there was any delay on the part of the Defendants in rejecting the documents. The contention of Chemical Bank had always been that the documents tendered by the beneficiary were in conformity with the L/C.

129. I have in my reference to these issues also held that it was not necessary for the Defendant to have instituted proceedings without first being paid by original Plaintiff No.1 the amounts wrongly debited by the negotiating bank.

130. In the circumstances, there is no question of the Defendants being negligent in representing the Plaintiffs case. In fact the communication between the Defendants and the negotiating bank demonstrates that the Defendants did everything necessary to reject the documents.

131. Had the Defendants not rejected the documents and made payment voluntarily to Chemical Bank, the case would have been entirely different. For in that event the Defendants would not have been entitled to be indemnified for any loss occasioned by their own fault.

132. Issue No.10 is therefore answered in the negative.

RE. ISSUE NO.11 :

11. Whether the Plaintiffs prove that the action of the Defendants withholding the sums of Rs.95,000/- and Rs.4,76,337.39/- belonging to the Plaintiff No.1 and Plaintiff No.2 respectively was unjustified and not valid as alleged in paragraphs 20, 23 and 28 of the Plaint ?

133. In view of what I have held, issue No.11 is answered in the negative.

RE. ISSUE NOS.13 AND 14 :

13. To what reliefs, if any, are the Plaintiffs entitled ?

14. What orders are to be passed ?

134. In the circumstances, suit No.873 of 1983 is decreed as prayed with costs as per rules.

135. Suit No.1012 of 1983 is dismissed. However there shall be no order as to costs. The two suits, as I observed at the outset, involved the same parties, common questions of law and identical facts. The evidence in both suits was also common. It was agreed that the result of Suit No.873 of 1983 would follow the results of this suit. Arguments were therefore common in both suits. There is no justification for ordering costs in this suit in view of costs having been awarded in Suit No.873 of 1983.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.873 OF 1983
WITH
SUIT NO. 1012 OF 1983

DATE OF DECISION : 18TH DECEMBER, 2006.

FOR APPROVAL AND SIGNATURE :

HON'BLE MR.JUSTICE S.J. VAZIFDAR :

1. Whether Reporters of Local Papers may be allowed to see the judgment ?)

2. To be referred to the Reporter or not ?)